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NATIONAL CAN C

STATE OF WASHINGTON I

On Appeal from the Supr

BRIEF OF THE COMMITTE
THE COUNCIL OF STATE
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JURISDICTION

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* Counsel of Record

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PPORT OF APPELLANTS'
L STATEMENT

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OCTOBER TERM, 1987

No. 87-1629

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of Appellants' Jurisdictional Statement in the above-captioned case. Written consents of the Appellants and the Appellee have been obtained and are attached herewith.

INTEREST OF *AMICUS CURIAE*

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 40 Chambers of Commerce. The Committee on State Taxation (COST),

one of the three advisory committees of the COUNCIL, consists of 269 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the States and others toward developing fair and equitable standards of state taxation. Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST has a vital interest, therefore, in cases such as the instant case in which Washington seeks to give "prospective only" effect to this Court's decision in *Tyler Pipe Company v. Washington Department of Revenue*, 107 S.Ct. 2810 (1987), invalidating the multiple activities exemption of the Washington business and occupation tax as unconstitutionally discriminatory under the Commerce Clause.

During the past five years, State after State has been taking a backdoor, prospective-only approach to adverse large-dollar state tax test cases. If a State wins, all companies lose. If a State loses, it declares that (i) the decision established a "new principle of law" under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); (ii) therefore, the decision should receive "prospective only" application; and (iii) either *all* companies or all companies, other than the victorious taxpayer, lose.

In *Chevron Oil*, this Court set forth a three-prong test for determining whether prospective effect should be given a decision: (1) The decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or deciding an issue of first impression whose resolution was not clearly foreseen; (2) The court must look to the prior history of the rule in question, its purpose and effect, and whether application to similarly-situated taxpayers for open years will further or retard its operation; *and* (3) The court must consider potential inequities and avoid injustice and

hardship. The "new principle of law" standard is being violated by many state departments of revenue and many state courts which ignore clearly controlling existing precedent and otherwise justify prospective application of this Court's decisions of unconstitutional state taxation.

The case at hand is particularly egregious. The Washington Supreme Court, in its ruling on remand that *Tyler Pipe* established a "new principle of law", *National Can Corp. v. Washington Department of Revenue*, 749 P.2d 1286 (Wash. 1988), disregarded this Court's heavy reliance on *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) and earlier cases in reaching the conclusion that "Washington's B&O tax is . . . inconsistent with our precedents". 107 S. Ct. at 2820. The principle that prohibits discrimination against interstate commerce is far from "new". *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). Nevertheless, in its holding of "pure prospective application" from June 23, 1987, the date of the *Tyler Pipe* decision, the court below denied the fruits of victory to all taxpayers, including National Can and the other interstate corporate taxpayers before this Court in *Tyler Pipe*. In so holding, the Washington Supreme Court determined that "for purposes of applying the refund statutes it is as if the taxes collected pre-*Tyler* were constitutionally collected." 749 P.2d at 1287. Thus, the Washington Supreme Court has held that the State can (1) retain all discriminatory taxes assessed and collected prior to June 23, 1987 and (2) continue to collect unpaid, unconstitutional proposed assessments for periods prior to June 23, 1987.

A substantial number of COST members are adversely affected by the January 28, 1988 ruling of the court below. If that ruling is permitted to stand, the finding of unconstitutional state taxation by this Court in *Tyler Pipe* will become meaningless. The State will contend that its 1985 and 1987 "quick fixes" solved the constitutional defect. In response to this Court's decision in

Armco, the Washington legislature on April 30, 1985 amended Wash. Rev. Code § 82.04.440, the provision containing the multiple activities exemption for wholly local intrastate manufacturer-sellers, to provide Washington manufacturers selling outside the State a manufacturing B&O tax credit for gross receipts taxes paid to other jurisdictions. This credit mechanism was to be applicable retroactively and prospectively from date of enactment but only if Washington's B&O tax multiple activities exemption was found to result in unconstitutional discrimination against interstate or foreign commerce. Laws of 1985, ch. 190. Following this Court's decision in *Tyler Pipe*, legislation was enacted on August 12, 1987 to allow out-of-state manufacturers selling into Washington a similar credit. Laws of 1987, 2d Ex. Sess., ch. 3. In light of the Washington Supreme Court's prospective holding of *Tyler Pipe*, all credits become effective June 1, 1987. ETB 537.04.19301, Wash. St. Dept. Rev. (Mar. 11, 1988). This alleged cure could then be challenged and declared unconstitutional by this Court in, say, 1993. The State will then declare that the 1988 holding involves a "new principle of law" which requires prospective application and the cycle will begin again.

The larger problem is the increasing number of jurisdictions which, during the past five years, have determined that judicial decisions invalidating unconstitutional state taxes should be applied prospectively. In *First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985), the Oklahoma Supreme Court applied its decision invalidating the state bank tax as unconstitutional under *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), prospectively only from January 24, 1983, the date of this Court's decision. In another instance where an unconstitutional taxing scheme was found under this Court's *Memphis Bank* decision, the state and the city differ in their application of the state court of appeals decision. The City of New York has

taken the position that the decision in *Matter of Forbes, Inc. v. Department of Finance*, 487 N.E. 2d 252 (N.Y. Ct. App. 1985), invalidating the City's treatment of federal government obligations for general corporation tax purposes as discriminatory and unconstitutional, is to be applied prospectively from November 19, 1985, the date of the New York Court of Appeals decision. The State of New York, in a commendable manner, allowed refund claims for all open years.

In *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W.V. 1986), *appeal dismissed*, 107 S. Ct. 1949 (1987), the West Virginia Supreme Judicial Court has applied prospectively this Court's decision in *Armco* to all taxpayers other than Armco. This Court dismissed Ashland's appeal of this decision of prospectivity for want of a final judgment, apparently to allow the state courts to rule on the nexus issue.

The Commonwealth of Pennsylvania is seeking prospective application of this Court's decision in *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987), invalidating the state's highway flat taxes as unconstitutionally discriminatory under the Commerce Clause. *See* 107 S.Ct. at 2847. Other States are applying the prospectivity doctrine to avoid refunds of similar flat taxes found unconstitutional under the *Scheiner* decision. *See American Trucking Associations, Inc. v. Gray*, No. 85-101 (Ark. Mar. 14, 1988) *reh'g denied* (Apr. 25, 1988) (holding *Scheiner* decision applicable prospectively not from the date of that decision but from August 14, 1987, the date Justice Blackmun ordered the contested taxes be placed in escrow. 108 S. Ct. 2 (1987)); *American Trucking Associations v. Goldstein*, No. 87182090/CE67934 (Md. Cir. Ct. Oct. 23, 1987), *appeal docketed*, No. 162 (Md. Ct. App.) (holding that Maryland decal fee is unconstitutional under *Scheiner* decision applicable prospectively from July 1, 1988 to allow state collection through current fiscal year). *But see American Truck-*

ing Associations, Inc. v. Conway, No. S-147-86WnC (Vt. Super. Ct. Feb. 11, 1988), *appeal docketed* No. 88-156 (Vt. Sup. Ct.) (holding that Vermont truck decal tax unconstitutional flat tax under *Scheiner* not applied prospectively since issue had been resolved in state courts in 1983 and thus taxpayers entitled to refund of escrowed tax payments).

In *Division of Alcoholic Beverages, et al. v. McKesson*, No. 70,368 (Fla. Sup. Ct. Feb. 18, 1988), the Florida Supreme Court held that although Florida's tax preferred treatment for alcoholic beverages made from Florida's crops is improper under *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the holding is "prospective" because of Florida's alleged "good faith reliance on a presumptively valid statute". *McKesson* is on all fours with *Bacchus*. Therefore, if the Court's *Chevron* standards were correctly applied, there would obviously be no "new principle of law" and no "presumptively valid" statute.

McKesson, Ashland Oil, American Trucking Associations, and particularly the case at hand vividly illustrate the lack of respect for precedent which is sweeping through the Nation's state tax departments.

Other States—including Michigan, Ohio, North Dakota and New Jersey—have also recently denied refunds to taxpayers by giving a decisional state or local tax rule prospective operation only. *Penn Mutual Life Ins. v. Department of Licensing & Regulation of the State of Michigan*, 412 N.W.2d 668 (Mich. Ct. App. 1987); *OAMCO v. Lindley*, 493 N.E.2d 1345 (Ohio 1986), *aff'd on reh'g*, 500 N.E.2d 1379 (Ohio 1987), *clarified, substituted op., in part*, 503 N.E.2d 1388 (Ohio 1987); *Metropolitan Life Ins. Co. v. North Dakota*, 373 N.W.2d 399 (N.D. 1985); *Salorio v. Glaser*, 461 A.2d 1100 (N.J. 1983), *cert. denied*, 464 U.S. 993 (1983).

Until the past five years, States and taxpayers generally recognized that holdings were not prospective and that similarly-situated taxpayers were entitled to equal protection under the law. There was an understanding that a test case would go forward and others would be held in abeyance. If a State won the test case, it would win similar cases. If it lost the test case, it would lose similar cases.

Many States now want to win if they win and win if they lose. They want to apply unfavorable judicial decisions on a prospective basis, thereby allowing them to retain revenues collected under unconstitutional laws and continue to collect revenues under those laws for periods prior to a court's holding of unconstitutionality. The retention of unconstitutional taxes violates the Constitution. The collection of unconstitutional taxes violates the Constitution. *See Carpenter v. Shaw*, 280 U.S. 363 (1930); *United States v. State Tax Commission of Mississippi*, 645 F.2d 4 (5th Cir. 1981), *cert. denied*, 454 U.S. 896 (1981). This wave of unconstitutional "prospective only" holdings is affecting our member companies in many parts of this Nation. COST is, therefore, vitally interested in this case.

SUMMARY OF ARGUMENT

This Court's decision in *Tyler Pipe Company v. Washington Department of Revenue*, holding the multiple activities exemption of the Washington B&O tax to be unconstitutionally discriminatory, was erroneously given "pure prospective" application by the Washington Supreme Court.

ARGUMENT

I. Discrimination Against Interstate Commerce is Unconstitutional

It has long been clear that the Commerce Clause prohibits taxes which favor local business over interstate commerce. *See Boston Stock Exchange v. State Tax Commisison*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); and *American Trucking Associations v. Scheiner*, 107 S.Ct. 2829 (1987). Despite the clarity of this principle, attempts to circumvent it are limited only by the imagination and the energy of state tax collectors.

II. The Washington B&O Tax

The Washington B&O Tax has been discriminating against interstate commerce for over 50 years. In 1948, the Washington Supreme Court held that the then-version of the tax's wholesale tax exemption for local manufacturers discriminated against interstate commerce and therefore violated the Commerce Clause of the Federal Constitution. *Columbia Steel Co. v. State*, 192 P.2d 976 (1948). In 1950, the Washington legislature made the first of several "quick fixes". That fix was described by this Court in *Tyler Pipe*, as follows (107 S.Ct. at 2814):

> "Two years later, in 1950, the Washington legislature responded to this ruling by turning the B & O tax exemption scheme inside out. The legislature removed the wholesale tax exemption for local manufacturers and replaced it with an exemption from the manufacturing tax for the portion of manufacturers' output that is subject to the wholesale tax. The result, as before 1950, is that local manufacturers pay the manufacturing tax on their interstate sales and out-of-state manufacturers pay the wholesale tax on their sales in Washington. Local manufacturer-whole-

> salers continue to pay only one gross receipts tax, but it is now applied to the activity of wholesaling rather than the activity of manufacturing." [Footnote deleted.]

III. ARMCO, Inc.

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984), involved a West Virginia tax identical in principle to the Washington B & O tax. West Virginia imposed a gross receipts tax on persons selling tangible property at wholesale. Local manufacturers were exempt from the tax because they paid a manufacturing tax on the value of products manufactured in West Virginia. This Court held that their exemption from the wholesale tax violated the principle that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U.S. at 642.

IV. The Tyler Pipe Case

On June 14, 1984, two days after *Armco* was decided by this Court, Washington's Director of Revenue wrote to Washington's Governor about the likely impact of *Armco* on Washington's B&O tax. Relying on advice from the Attorney General's office, the Director stated, in pertinent part:

> "In the opinion of our attorneys the reasoning of the Court in the *Armco* decision is clearly applicable to our statutory arrangement. . . ." J.S. App.F 80a.

That advice was ignored. The consolidated action now before this Court was commenced and the seventy-one taxpayers consolidated in this proceeding filed actions for refunds. Anticipating a "prospective only" position by the appellee, they argued for an injunction against the collection of future taxes. The appellee argued that an injunction was unnecessary because the appellants had the right to refunds (refunds which the appellee and the Washington Supreme Court now refuse to grant). An

injunction was not obtained. In fact, Tyler Pipe had earlier been unsuccessful in its efforts before the Washington Supreme Court to obtain an injunction. *See Tyler Pipe Industries, Inc. v. Department of Revenue,* 638 P.2d 1213 (1982).

On June 23, 1987, this Court issued its opinion in *Tyler Pipe* and stated as follows:

> "We conclude that Washington's multiple activities exemption discriminates against interstate commerce as did the tax struck down by the Washington Supreme Court in 1948 and the West Virginia tax that we invalidated in *Armco.* The current B & O tax exposes manufacturing or selling activity outside the state to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt. 107 S.Ct. at 2820.
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> * * *
>
> Our holding that Washington's tax exemption for a local manufacturer-wholesaler violates the Commerce Clause disposes of the issues raised by those appellants in *National Can* that manufacture goods in Washington and sell them outside the State, as well as the claim of discrimination asserted by those appellants that manufacture goods outside Washington and sell them within the State. 107 S.Ct. at 2821.
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> * * *
>
> The Department of Revenue argues that any adverse decision in these cases should not be applied retroactively because the taxes at issue were assessed prior to our opinion in *Armco* and *the holding in that case* was not clearly foreshadowed by earlier opinions. See *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-107 (1971). [Emphasis supplied.] 107 S.Ct. at 2822.
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> * * *
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> We conclude that it is likewise appropriate for the Supreme Court of Washington to address *in the first instance* the refund issues raised by our rulings in these cases." [Emphasis supplied.] 107 S.Ct. at 2823.

On January 28, 1988, the Washington Supreme Court concluded in *National Can* that "pure" prospective application of this Court's *Tyler Pipe* decision from June 23, 1987 is "appropriate" for the following reasons:

> "The threshold factor necessary for prospective application is a finding that the *Tyler* decision established a new principle of law overruling past precedent on which the litigants may have relied. *Chevron Oil*, 404 U.S. at 106, 92 S.Ct. at 355. *This court's unanimous decisions* in *National Can* and *Tyler Pipe*, the long line of [Washington Supreme Court] cases upholding the Washington B&O tax, the fact that *Tyler* overruled past precedent on which the states may have relied, and Justice Scalia's dissent in *Tyler*, all compel the conclusion that *Tyler* did establish new principles of law. [Emphasis supplied.] 749 P.2d at 1288.
>
> * * *
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> Taxpayer Tyler Pipe argues that, because the State argued against an injunction for the collection of taxes pending resolution of the constitutionality of the B & O tax, it now has an absolute right to a refund under the Washington refund statutes. This court denied the requested injunction not only because a remedy at law existed but also because Tyler Pipe failed to make the requisite showing of a likelihood of success on the merits. *Tyler Pipe Indus., Inc. v. Department of Rev.*, 96 Wn.2d 785, 794, 638 P.2d 1213 (1982). *The fact that the State argued that taxpayers had an adequate remedy at law in the form of a possible refund should not mean the State is foreclosed from arguing that such a refund is not* (under applicable preexisting law) *now owed to the taxpayers.* Because under Washington law a refund suit constitutes an adequate legal remedy foreclosing a preliminary injunction, it does not mean a successful taxpayer necessarily is entitled to retroactive application of his case." [Emphasis supplied.] 749 P.2d at 1292.

V. Attempts to Circumvent Commerce Clause Holdings

The message from many state departments of revenue and many state courts is loud and clear—if a court's holding involves large potential refunds for many taxpayers, it is probable that no refunds will be granted. If *Chevron* allows the tax collector to determine what is and what is not a "new principle of law" and what is and what is not an "inequity", holdings adverse to the tax collector will be considered new principles of law and large potential refunds will be considered inequitable. The record will be ignored. Legal advice will be ignored. Tax collectors' own arguments against injunctions will be ignored. This Court's opinions will be treated as advisory opinions which do not have to be followed.

With respect to the "inequity" point in *Chevron*, we submit that the proper analysis was stated in *American Trucking Associations v. Conway*, No. S-147-86WnC, (Vt. Super. Ct. Feb. 11, 1988), *appeal docketed* No. 88-156 (Vt. Sup. Ct.), an opinion which denied Vermont's attempt to impose a "prospective only" determination on the application of *American Trucking Associations v. Scheiner*, 107 S.Ct. 2829 (1987). The Vermont court stated:

> "What is conclusive is that the plaintiffs paid an illegal tax. They have standing to complain about it, and the court has power to refund it to them. The defendants' windfall argument cuts both ways—the issue is whether it is fairer to give the money to the plaintiffs, who may have been able to pass on the costs of the tax to consumers, or to the state, which after notice of the unconstitutionality of the tax nonetheless put it into place. *Equity supports giving that windfall, if it exists, to the wronged plaintiffs. Comparative need is not a factor to be considered.*" [Emphasis supplied.] No. S-147-86WnC, slip op. at 5.

VI. The States are Divided

Vermont, New York and Iowa (*See Burlington Northern Railroad Co. v. Board of Supervisors*, 418 N.W.2d 72 (Iowa 1988))—consistent with the position of the *majority* of the States—take the high road and apply court decisions equally to similarly situated taxpayers for open years. Arkansas, Florida, Maryland, Michigan, New Jersey, North Dakota, New York City, Ohio, Oklahoma, Washington and West Virginia are among the increasing number of States which have recently taken the low road and declared the emergence of "new principles of law" when the dollars involved are substantial. This is a disturbing trend. The Court should resolve this conflict as soon as possible.

VII. *Griffith v. Kentucky*

There should be a better way. Consideration should be given to replacing the *Chevron* standards with the criminal case principles of *Griffith v. Kentucky*, 107 S.Ct. 708 (1987). In that opinion, this Court stated:

> "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First, it is settled principle that this Court adjudicates only "cases" and "controversies." See U.S. Const., Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, *the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.* Justice Harlan observed:
>
> > 'If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is dif-

> ficult to see why we should so adjudicate any case at all. . . .'
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> * * * *
>
> As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But *we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final.* Thus, it is the nature of judicial review that precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'
>
> Second, *selective application of new rules violates the principle of treating similarly situated defendants the same.* As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is 'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule. (emphasis in original). Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: 'The time for toleration has come to an end.' [Citations deleted; emphasis supplied.] 107 S.Ct. at 714.

The rationale of this Court in *Griffith* for eliminating deviating retrospective rules applies equally here. As one noted commentator has observed: "Since many state courts have applied their own standards to determine retroactivity of a decision holding a state tax unconstitutional, the issue would seem to cry out for clarification by the Court." [1]

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[1] Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, A.B.A. Tax Lawyer, Fall 1987, at 103, 141 (footnote omitted).

CONCLUSION

For the foregoing reasons, COST urges this Court to note probable jurisdiction in the present case and give plenary consideration to the questions discussed in Appellant's Jurisdictional Statement.

Dated: April 29, 1988

Respectfully submitted,

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